

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **200839001**

Release Date: 9/26/2008

CC:PA:BR4:
GL-129051-08

UILC: 6325.05-00

date: August 25, 2008

to: Associate Area Counsel
Small Business/Self Employed--Long Island
(CC:SB:1:LI)

from:
Chief, Branch 4 (CC:PA:Br4)

subject: Self-releasing Liens and New York State Tax Warrants

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether a federal tax lien that initially arose prior to a New York State tax lien, was released by a self-releasing notice of federal tax lien, and then reinstated after the state tax lien arose primes the state tax lien.

CONCLUSIONS

A federal tax lien that initially arose prior to a New York State tax lien, was released by a self-releasing notice of federal tax lien, and then reinstated after the state tax lien arose does not prime the state tax lien. A lien that has been reinstated is effective as of the date the notice revoking the release of lien is mailed to the taxpayer and has the same force and effect as of the reinstatement date as a general tax lien created by an assessment.

FACTS

The Service assesses a federal tax liability, creating a federal tax lien, prior to the date on which the State of New York files a tax warrant for a state tax liability. Subsequently, the notice of federal tax lien securing the federal tax liability self-releases the underlying

federal tax lien. The Service later revokes the release of the federal tax lien and reinstates the lien after the date on which the state filed its tax warrant.

LAW AND ANALYSIS

Because a state tax lien is not one of the interests set forth in section 6323(a), a notice of federal tax lien does not need to be filed to establish the government's relative priority with respect to a state tax lien. The relative priority of a federal tax lien vis a vis a state tax lien is determined by the principal "first in time first in right." United States v. City of New Britain, 347 U.S. 81, 85 (1954). Pursuant to this principal, the relative priorities of the federal tax lien and a state tax lien "depends on the time [each lien] attached to the property in question and became choate." Id., at 86. The first to attach and become choate has priority.

A federal tax lien arises and is choate "at the time the assessment is made." I.R.C. § 6322; see, United States v. State of Vermont, 377 U.S. 351, 355 (1964). At this point the lien attaches to all of a taxpayer's property and rights to property. I.R.C. § 6321. A tax lien in New York arises, attaches to the "title to and interest in real, personal and other property of the taxpayer," and is choate when a tax warrant is filed in the appropriate office and entered in the judgment docket. New York Tax Law § 692 (McKinney 2008); In re Thriftway Auto Rental Corp., 457 F.2d 409, 411-12 (2d Cir. 1972); see, Corrigan v. United States Fire Insurance Co., 427 F.Supp. 940 (S.D. NY 1977).

In your scenario, the Service assessed the federal income tax liability prior to the State of New York filing its tax warrant; therefore the federal tax lien initially primed the state tax lien. The twist in your scenario is that the notice of federal tax lien subsequently self-released the underlying federal tax lien. When the Service discovered that the lien had been released, it filed a notice revoking the release; this action reinstated the lien.

Pursuant to section 6325, the Service must issue a certificate of release of a lien no later than thirty days after the liability listed in the notice has been fully satisfied or become unenforceable as a matter of law. If the Service fails to release a lien at the appropriate time, it may be held liable for damages to the taxpayer under section 7432. In order to ensure that a lien is released timely, the Service has developed self-releasing liens.

Notice of Federal Tax Lien, Form 668(Y)(c), provides that unless the notice is refiled by the dates set forth for each assessment listed in the notice, the notice shall operate as a certificate of release of the liens securing the listed assessments. According to section 6323(f)(1)(A), a certificate of release "shall be conclusive that the lien referred to in such certificate is extinguished." (Emphasis added).

When a lien has been released, the Service may revoke the release and reinstate the lien if an "appropriate official determines that. . . the certificate of release. . . of the

general tax lien . . . was issued erroneously or improvidently.” Treas. Reg. § 301.6325-1(f)(2)(a). The reinstatement of the lien generally is effective as of the date the notice of revocation is mailed to the taxpayer; however, the reinstated lien is not effective before the filing of the notice of revocation if a filing is required because the notice of federal tax lien had been filed. Treas. Reg. § 301.6325-1(f)(2)(iii)(a). As of the effective date of the reinstatement, the reinstated lien “has the same force and effect as a general tax lien imposed by section 6321 which arises upon assessment of the tax liability.” Treas. Reg. § 301.6325-1(f)(2)(iii)(b).

Although the federal tax lien in your scenario initially primed New York’s tax lien because the federal lien attached to the taxpayer’s property before New York’s lien arose, attached, and became choate when the tax warrant was filed, City of New Britain, at 85, the federal lien lost its priority when it was released and not reinstated until after New York’s lien became choate. The release of the lien by Form 668(y)(c) extinguished the federal lien, which did not “arise” again until it was reinstated after New York’s lien had arisen and become choate by the filing of the tax warrant.

Please call (202) 622-3630 if you have any further questions.